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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RODNEY WAYNE JONES,

Plaintiff and Appellant,

v.

MATTHEW CATE, et al.,

Defendant and Respondent.

F063338

(Super. Ct. No. 10C0256)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Donna L. Tarter, Judge.

Rodney Wayne Jones, in pro. per., for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Thomas S. Patterson and Michael J. Quinn, Deputy Attorneys General, for Defendant and Appellant.

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Plaintiff Rodney Wayne Jones, a prisoner in the Security Housing Unit (SHU) in the state prison at Corcoran, alleges that prison guards took and destroyed his personal and legal property. Plaintiff filed a grievance and pursued it through the four levels of administrative review. Those reviews found, in essence, that all legal materials had been returned to plaintiff and the items of personal property were excess property disposed of in accordance with prison regulations.

Plaintiff filed this lawsuit, alleging that prison officials violated (1) his due process rights, (2) his right to equal protection, and (3) his First Amendment rights to (a) be free from retaliatory action and (b) access to the courts. The defendants demurred to these claims. The trial court sustained the demurrer without leave to amend and plaintiff appealed.

We conclude plaintiff's allegations do not state an equal protection violation because indigency is not a suspect classification and the regulations for the disposition of excess inmate property satisfy the rational basis test. Also, plaintiff's allegations do not state a claim for the deprivation of property without due process of law because California law provides plaintiff with an adequate post-deprivation remedy.

We further conclude plaintiff's allegations that his legal property was destroyed in retaliation for his filing a grievance states a claim for retaliation in violation of his First Amendment rights. Also, we direct the trial court to grant plaintiff leave to amend his access-to-court claim to set forth factual allegations satisfying the actual injury requirement for such a claim.

We therefore reverse the judgment.

FACTS

Because we are reviewing an order sustaining a demurrer, we are required to accept as true the allegations of fact set forth in plaintiff's complaint. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) Therefore, the facts set forth in this opinion are taken from the allegations in plaintiff's pleadings and the attached exhibits.

Plaintiff Rodney Wayne Jones is an inmate in the custody of the California Department of Corrections and Rehabilitation (the Department). During the time relevant to this lawsuit, plaintiff was incarcerated at the state prison located in Corcoran, California.

The defendants are Correctional Officers E. Banuelos and G. Rodriguez; Correctional Sergeant V. Rangel; Associate Warden T. Norton; Chief Deputy Warden R.

Davis; Chief of Inmate Appeals N. Grannis; Warden Derral G. Adams; and the Secretary of the Department, Matthew Cate.

Between June 2006 and January 2009, plaintiff was transferred from prison to court on at least 10 different occasions to attend proceedings in Imperial County Superior Court.

On January 16, 2009, plaintiff was returned to the SHU at the Corcoran prison after his final court appearance at the Imperial County Superior Court.

On January 30, 2009, while plaintiff was waiting in the medical clinic, most of his personal and legal property was delivered to his assigned cell. As plaintiff was being examined by a doctor, a property officer approached plaintiff and requested plaintiff to sign a property receipt if he wanted his property. Plaintiff reluctantly signed the receipt on form CDCR 1083. Upon return to his cell, plaintiff noticed items were missing, including legal documents, articles, exhibits, notes and legal papers pertaining to his court cases.

On February 3, 2009, plaintiff was reissued his personal television and other miscellaneous items, but additional personal items belonging to plaintiff again were confiscated by SHU Property Officer E. Banuelos. Plaintiff signed a receipt on another form CDCR 1083.

On February 17, 2009, plaintiff initiated a written grievance using a CDC 602 appeal form, which he alleges was given Log No. CSPC-6-09-01263 (CDC 602 Appeal). In the form, Plaintiff requested the delivery of his remaining personal and legal property "ASAP as [his] court cases are still active with a court deadline of April 10, 2009." (Some capitalization omitted.)

On February 26, 2009, Officer G. Rodriguez finished an informal level review of the grievance, completed section C of the CDC 602 Appeal, and returned it to plaintiff. The response in section C stated: "This appeal is partially granted. Your property was issued to you on two different days. See attached CDC 1083. All legal work was issued

to you. Officer E. Banuelos inventoried you[r] property on two different days." (Some capitalization omitted.) Despite the statement that the appeal was partially granted, no additional personal or legal property was returned to plaintiff.

On February 28, 2009, Officer Rodriguez provided plaintiff with written notice that his confiscated property would be disposed of if he failed to comply with the notice. That very same day, the confiscated personal and legal property belonging to plaintiff was destroyed. The headings on the notice form were "4B SHU MAIL-OUT DISPOSAL NOTICE" and "CDC 128-B INFORMATIVE CHRONO." The notice stated that (1) plaintiff had mail-out property at the mail-out room; (2) plaintiff chose to mail out the property, but his trust account had insufficient funds to cover the postage; and (3) plaintiff had 30 days from January 30, 2009, to provide the necessary funds or his property would be disposed of pursuant to California Code of Regulations, title 15, section 3191, subdivision (c) (CCR 3191(c)). Plaintiff alleges that his property was destroyed because of his indigent status and in retaliation for his filing the CDC 602 Appeal.

On March 30, 2009, prior to receiving notice that his personal and legal property already had been destroyed, plaintiff completed section D of the CDC 602 Appeal and resubmitted it for first level review. In the section of the CDC 602 Appeal concerning formal review, plaintiff stated that, as of March 30, 2009, all legal property had not been issued to him.

On April 24, 2009, plaintiff was interviewed by Sergeant V. Rangel by telephone. After the interview, Sergeant V. Rangel and Associate Warden T. Norton issued a first level response denying plaintiff's appeal. The written first level response dated April 24, 2009, indicated that the denial was based in part on Officer E. Banuelos's statement that he processed plaintiff's property and issued plaintiff all of his legal material and allowable SHU property. The written first level response also stated that disposal of

plaintiff's property was in compliance with applicable rules because plaintiff refused to select a method to dispose of his excess property.

Plaintiff was dissatisfied with the first level response. On May 11, 2009, plaintiff completed section F of the CDC 602 Appeal and requested second level review. Plaintiff alleges by the time he requested the second level review he had received notice that his personal and legal property already had been destroyed. Plaintiff's entry in section F of the CDC 602 Appeal stated that prison staff clearly violated his equal protection and due process rights by (1) discriminating against him by refusing to mail his property home due to insufficient funds and (2) disposing of his property prior to the full or partial completion of his appeal.

On June 16, 2009, Chief Deputy Warden R. Davis issued a written second level appeal response denying plaintiff's appeal. The written response addressed plaintiff's position that legal property had not been returned to him: "Per staff, all your legal material has been issued to you." The written response also stated: "[Y]ou refused to sign or designate the method of disposition on the Trust Account Withdrawal From (CDC 193). Therefore, staff disposed of the property pursuant to policy and procedure."

On June 29, 2009, plaintiff completed section H of the CDC 602 Appeal and requested director's level review. Plaintiff stated that although the wrongful disposal of his personal and legal property appeared to be final and irreplaceable, he continued to seek specific recovery of the property or its value in accordance with the Department operations manual, article 43, section 54030.6.

On July 23, 2009, plaintiff completed and submitted a government claim form to the California Victim Compensation and Government Claims Board in Sacramento. Plaintiff stated he was injured by state prison employees' illegal and intentional disposal of his personal and legal property and requested compensatory damages of $11,707.30 and punitive damages of $25,000.00.

On September 14, 2009, plaintiff's CDC 602 Appeal was denied by Chief N. Grannis. The written denial stated that the "decision exhausts the administrative remedy available to [plaintiff] within [the Department]."[1]

Later in September 2009, the California Victim Compensation and Government Claims Board rejected plaintiff's claim and informed plaintiff of its action by letter.

PROCEEDINGS

On June 23, 2010, plaintiff filed a complaint for property damage using Judicial Council Form PLD-PI-001 (rev. Jan. 1, 2007). In item 10 of the form, plaintiff checked the box indicating that he had attached causes of action for "Intentional Tort." In item 11, plaintiff checked the box that alleged he had suffered "loss of use of property." Attached to the form pleading were an 11-page hand-written "State Tort Complaint" and eight exhibits labeled A through H. The exhibits were various documents relating to the prison's handling of plaintiff's property, including the CDC 602 Appeal and the responses generated by the different levels of review.

On May 6, 2011, plaintiff filed a "First Amended State Tort Complaint" (FAC). The FAC repeated many of the allegations in the original complaint, attached the same eight exhibits, and included counts for (1) due process violations, (2) an equal protection violation, and (3) First Amendment violations concerning the right to access the courts and retaliation. Plaintiff requested an injunction stopping the Department's illegal and discriminatory practices of disposing of indigent inmates' personal and legal property, compensatory damages of $11,707.30, and punitive damages of $25,000.00.

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[1] The Department's regulations provide an administrative remedy—an appeal process consisting of four levels of review—that must be exhausted before a prisoner may file a lawsuit. (*Wright v. State of California* (2004) 122 Cal.App.4th 659, 666-667; see Cal. Code Regs., tit. 15, §§ 3084.1, 3084.5 & 3084.7 [right to appeal, screening and managing appeals, and levels of appeal review].)

Defendants Banuelos, Rodriguez, Rangel, Davis and Adams filed a demurrer to the FAC. On June 30, 2011, the trial court sustained their demurrer without leave to amend, concluding that the pleading did not allege facts sufficient to state a cause of action under any legal theory.

On August 1, 2011, plaintiff filed a notice of appeal that stated he was appealing from the June 30, 2011, judgment of dismissal after an order sustaining a demurrer.

At a time that cannot be determined from the record, defendants Norton and Cate were served with the FAC. They subsequently filed a demurrer. On August 17, 2011, the trial court sustained their demurrer without leave to amend. Among other things, the court concluded that (1) the allegations regarding Associate Warden Norton's involvement in the inmate grievance procedures were insufficient to state a due process violation against him and (2) the allegations that Secretary Cate knew of his subordinate's alleged constitutional violations, without specific allegations of personal involvement, did not state a claim for supervisory liability against him.

Plaintiff did not file a notice of appeal concerning the second demurrer and the related August 17, 2011, order. Therefore, the only matter subject to review in this appeal is the order sustaining the demurrer of defendants Banuelos, Rodriguez, Rangel, Davis and Adams.

On November 2, 2011, the trial court filed a judgment in favor of all seven demurring defendants.

DISCUSSION

I. APPEALABLE ORDER OR JUDGMENT

Plaintiff's notice of appeal states that he appeals from the June 30, 2011, judgment of dismissal after an order sustaining a demurrer. No such judgment is included in the appellate record. Instead, the record contains a June 30, 2011, order sustaining the demurrer of defendants Banuelos, Rodriguez, Rangel, Davis and Adams to the FAC.

Because orders sustaining demurrers are not appealable (*Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1019), it appears that plaintiff has attempted to appeal from a nonappealable order.

To avoid delay in handling this appeal, we (1) directed the superior court clerk to augment the appellate record with the judgment that was entered on November 2, 2011, and (2) will treat plaintiff's premature notice of appeal as applying to that judgment. (Cal. Rules of Court, rule 8.104(d)(2); *State Comp. Ins. Fund v. WallDesign Inc.* (2011) 199 Cal.App.4th 1525, 1529 [court augmented record with judgment and treated notice of appeal as having been filed immediately after the judgment].)

II. STANDARD OF REVIEW APPLICABLE TO DEMURRER

Our standard of review of an order sustaining a demurrer on the ground that the complaint, here the FAC, fails to state facts sufficient to constitute a cause of action is well settled. We independently review the ruling on demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.)

When conducting this de novo review, "[w]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.]" (*City of Dinuba v. County of Tulare, supra,* 41 Cal.4th 859, 865.) Our consideration of facts also includes "those evidentiary facts found in recitals of exhibits attached to a complaint." (*Satten v. Webb* (2002) 99 Cal.App.4th 365, 375.)

When a demurrer is properly sustained on the ground that the complaint fails to state facts sufficient to constitute a cause of action, and leave to amend is denied, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not,

there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

III. EQUAL PROTECTION CLAIM

Plaintiff alleged that prison officials refused to mail his property home due to insufficient funds. He contends that CCR 3191(c), which was the basis for the official's refusal, is unconstitutional because it violated the equal protection clause by providing discriminatory and unequal treatment against indigent prisoners who are situated similarly to nonindigent prisoners.

A. General Principles

Both the federal and state constitutions include equal protection guarantees. "No State shall … deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend. § 1.) Similarly, article I, section 7, subdivision (a) of the California Constitution provides: "A person may not be … denied equal protection of the laws …." The equal protection clause has been summarized as "essentially a direction that all persons similarly situated should be treated alike." (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439.)

The elements of an equal protection claim have been addressed by the California Supreme Court:

> "'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

When a showing has been made that two similarly situated groups are treated disparately, the next element of a meritorious equal protection claim concerns whether the government had a sufficient reason for distinguishing between the two groups. (*In re*

Brian J. (2007) 150 Cal.App.4th 97, 125.) Whether the government had a sufficient reason to subject the groups to different treatment is tested using one of three different standards.

First, where a statute or regulation makes distinctions involving inherently suspect classifications or fundamental rights, it is subject to *strict scrutiny* and may be upheld only if the government establishes the distinction is necessary to achieve a compelling state interest. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 480.) Second, distinctions based on gender are subject to an *intermediate* level of review. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200.) Third and most commonly, the challenged distinctions must bear a rational relationship to a legitimate state purpose. (*Ibid*.) Stated otherwise, this latter standard requires the statute or regulation to be upheld if there is any reasonably conceivable set of facts that provides a *rational basis* for the classification. (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313.)

Under the rational basis test, the party challenging the statute or regulation must demonstrate that the difference in treatment is unrelated to the achievement of any legitimate government purpose. (*Kasler v. Lockyer*, *supra*, 23 Cal.4th at p. 480.) Thus, application of the rational basis test involves a strong presumption favoring the validity of the challenged statute or regulation. (*Ibid*.)

B. Application of Principles

For purposes of analyzing plaintiff's equal protection claim, we will assume that, among prisoners with excess property they wish to mail home, prisoners with the money to pay for postage are *similarly situated* to those lacking funds to pay for postage. We will further assume that the regulation authorizing the disposal of the excess property of prisoners who cannot pay for postage provides for *disparate treatment* of the two groups of similarly situated prisoners. Consequently, the critical questions for our equal protection analysis concern (1) which standard—strict scrutiny, intermediate review or

the rational basis test—applies to the disparate treatment of the two groups and (2) whether the government's reasons for distinguishing between the two groups were sufficient under the applicable standard.

1. Rational Basis Test Applies

In *Rodriguez v. Cook* (9th Cir. 1999) 169 F.3d 1176, a prisoner challenged a federal statute that denied in forma pauperis status to prisoners who had three or more civil cases dismissed as frivolous. The prisoner contended the statute was unconstitutional on equal protection grounds because it treated indigent prisoners differently than wealthy prisoners. (*Id*. at p. 1178.) In addressing what level of scrutiny to apply to the classification created by the statute, the court stated:

> "Initially, we note that indigent prisoners are not a suspect class. See *Harris [v. McRae* (1980)] 448 U.S. [297,] 323 (indigent persons are not a suspect class); *Webber v. Crabtree*, 158 F.3d 460, 461 (9th Cir. 1998) (prisoners are not a suspect class); *Tucker v. Branker*, 142 F.3d 1294 (D.C. Cir. 1998) (indigent prisoners are not a suspect class)." (*Rodriguez v. Cook*, *supra*, 169 F.3d at p. 1179.)

We will follow this precedent and conclude that indigent prisoners are not a suspect class. (See *Neil S. v. Mary L.* (2011) 199 Cal.App.4th 240, 254 [suspect classifications include those based on race, nationality or alienage].) In addition, we conclude that a prisoner's right to send excess property to persons outside the prison is not a fundamental right. (See *Sakotas v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 262, 272 [fundamental rights include personal liberty, right to privacy, right to procreation, right to vote, right to run for office, and right to a public education].) Accordingly, we further conclude that the rational basis test applies to the provisions of CCR 3191(c) that address the handling of a prisoner's excess property.

2. The Regulation Is Rational

Next, we will consider whether the government had a sufficient reason—that is, one that satisfies the rational basis test—for allowing prisoners with sufficient funds to

pay for postage to mail their excess property to third parties outside the prison while prisoners lacking sufficient funds cannot mail out their property.

Here, defendants argue that the State of California had a legitimate and rational interest in conserving its limited resources, and on that basis chose not to provide postage to indigent inmates who are required to either mail out their excess property or have it disposed of by other means. (See *Mathews v. Eldridge* (1976) 424 U.S. 319, 348 [government's interest in conserving scarce fiscal and administrative resources is a factor to be weighed in determining whether due process requires a particular procedural safeguard].)

Plaintiff, as the party challenging the regulation, must demonstrate that the difference in treatment is unrelated to the achievement of any legitimate government purpose. (*Kasler v. Lockyer*, *supra*, 23 Cal.4th at p. 480.) Plaintiff has not made the necessary demonstration in this case. Instead, defendants have shown that the State of California has a legitimate interest in preserving resources and CCR 3191(c) would save resources that otherwise would have been expended on (1) providing postage to indigent prisoners to allow them to mail out excess property or (2) storing that property for the prisoner.

Therefore, we conclude the treatment of indigent prisoners under the property disposition provisions set forth in CCR 3191(c) does not violate the equal protection clause in the United States Constitution or the California Constitution.[2]

IV. DUE PROCESS CLAIM

The first footnote in plaintiff's opening brief asserts that he is not claiming his due process rights were violated by the *seizure* of his personal and legal property. Instead, he

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[2] Even if a violation of the right to equal protection set forth in the California Constitution had occurred, damages are not among the remedies available for such a violation. (*Gates v. Superior Court* (1995) 32 Cal.App.4th 481, 518.)

explicitly states that his due process claim concerns "the disposal of [his] personal and legal property prior to adequate notice and/or an opportunity to be heard at a meaningful time and in a meaningful manner."[3]

A. General Principles

Both the federal and state constitutions include a due process clause. Section 1 of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of … property, without due process of law …." Article I, section 7, subdivision (a) of the California Constitution states in relevant part: "A person may not be deprived of … property without due process of law …." These requirements for procedural due process impose constraints on governmental decisions that deprive individuals of interests that qualify as "property" for purposes of the due process clauses. (*Mathews v. Eldridge*, *supra*, 424 U.S. at p. 332.)

As a basic proposition, every governmental deprivation of an individual's "property" within the purview of the due process clause requires some form of notice and a hearing. (*Beaudreau v. Superior Court* (1975) 14 Cal.3d 448, 458.) The requirement for a hearing means "the opportunity to be heard 'at a meaningful time and in a meaningful manner.' [Citations.]" (*Mathews v. Eldridge*, *supra*, 424 U.S. at p. 333.)

The process that is due prisoners who claim to have been deprived of property has been addressed by the United States Supreme Court. In *Parratt v. Taylor* (1981) 451 U.S. 527, a state prison inmate sued prison officials after mail-order hobby materials were lost when the prison's normal procedures for receipt of mail packages were not followed. The court observed that prisoners who suffered a tortious loss of property were

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3 As noted by the court in *Leslie's Pool Mart, Inc. v. Department of Food & Agriculture* (1990) 223 Cal.App.3d 1524, where the governmental agency has provided a post-deprivation hearing, the issue commonly raised is "whether the administrative hearing met the meaningful time/meaningful manner requirements. [Citations.]" (*Id*. at p. 1536, fn. 10.)

provided with post-deprivation remedies under Nebraska's tort claims law and concluded these post-deprivation procedures and remedies were adequate to satisfy due process. (*Id*. at p. 543.) In *Hudson v. Palmer* (1984) 468 U.S. 517 (*Hudson*), the court extended this holding to cases in which the deprivation of property resulted from intentional action.

The decision in *Hudson* led the Ninth Circuit Court of Appeals to consider whether California's Government Claims Act (Gov. Code, § 810 et seq.)[4] provided adequate post-deprivation remedies and, thus, satisfied the requirements of due process. (*Barnett v. Centoni* (9th Cir. 1994) 31 F.3d 813, 816-817.) The court concluded those remedies were adequate. (*Ibid*.; *Jacobs v. Director of California Dept. of Corrections* (9th Cir. 2012) 470 Fed.Appx. 693 [allegations of unauthorized deductions from state prisoner's trust account did not state a claim for violation of prisoner's due process rights because California law provided an adequate post-deprivation remedy].)

B. Application of Principles

The Ninth Circuit cases establish that California's Government Claims Act provides adequate post-deprivation remedies to inmates who allege prison officials have wrongfully taken their property. Based on those cases, we reject plaintiff's argument that the due process requirement for an "opportunity to be heard 'at a meaningful time and in a meaningful manner'" (*Mathews v. Eldridge*, *supra*, 424 U.S. at p. 333) requires that he and other prisoners be given a hearing *before* prison officials destroy or otherwise dispose of their property pursuant to CCR 3191(c). The post-deprivation procedures and remedies provided pursuant to the Department's administrative appeal process and the Government Claims Act are sufficient to satisfy the requirements of due process.

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4 This legislation was commonly referred to as the "Tort Claims Act," but in *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, the Supreme Court stated that "Government Claims Act" was a more accurate name because the legislation covers both tort and contract claims. (*Id*. at p. 742.)

Therefore, we conclude that plaintiff has failed to state a cause of action based on the legal theory that the confiscation and destruction of his property violated his due process rights.[5]

V. RETALIATION CLAIM

A. Basic Principles

A prisoner's First Amendment rights include the right to file grievances and pursue civil rights litigation in the courts. (*Rhodes v. Robinson* (9th Cir. 2005) 408 F.3d 559, 567.) Prison authorities may not penalize or retaliate against an inmate for exercising these rights. (*Bradley v. Hall* (9th Cir. 1995) 64 F.3d 1276, 1279.) A First Amendment retaliation claim consists of the following five basic elements: (1) A state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal. (*Rhodes v. Robinson*, *supra*, 408 F.3d at pp. 567-568.)

As to the first through third elements, the plaintiff has the burden of showing that his exercise of his constitutionally protected rights was a substantial or motivating factor behind the defendants' conduct. (*Soranno's Gasco, Inc. v. Morgan* (9th Cir. 1989) 874 F.2d 1310, 1314.) The fourth element, chilling effect, might be satisfied by an allegation that plaintiff suffered harm. (*Rhodes v. Robinson*, *supra*, 408 F.3d at p. 568, fn. 11.)

B. Plaintiff's Allegations

The FAC's introduction alleges that "Defendants E. Banuelos and G. Rodriguez … intentionally, illegally, and maliciously confiscated and disposed of Plaintiff's … legal

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[5] Even if a violation of the due process rights set forth in article I, section 7, subdivision (a) of the California Constitution had occurred, damages are not among the remedies available for such a violation. (*Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 329 [no private right of action for damages under the due process clause of the California Constitution].)

property [while] motivated by a retaliatory intent …." Footnote 3 of the FAC alleges that a "total of 128 personal and legal items were collectively confiscated and destroyed by Defendants Banuelos and Rodriguez …." These allegations identify action by a state employee that is adverse to the inmate and, thus, satisfy that element of a retaliation claim.

The element concerning protected conduct by the prisoner is fulfilled by plaintiff's allegation that on February 17, 2009, plaintiff initiated the CDC 602 Appeal. The grievance included a request for the return of his remaining legal property.

Our analysis of the element requiring a causal connection between the inmate's protected conduct and the prisoner officials' adverse action against the inmate begins by noting that the sequence of pertinent events starts with the January 30, 2009, failure to return legal documents and papers to plaintiff. After plaintiff received additional property in early February, he initiated a grievance by submitting the CDC 602 Appeal on February 17, 2009. Officer Rodriguez conducted the informal review and, on February 26, 2009, set forth his response in section C of the CDC 602 Appeal. Officer Rodriguez stated that the "appeal is partially granted," though it is uncertain what this meant. He rejected plaintiff's allegation of missing legal papers by stating that all legal work had been issued to plaintiff. Plaintiff alleges that two days later, on February 28, 2009, Officer Rodriguez disposed of his legal property "undoubtedly [in] retaliation for filing said CDC 602 Appeal (i.e., constitutionally-protected conduct) …."

C. Trial Court's Ruling

The trial court determined plaintiff failed to state an actionable retaliation claim because the adverse action preceded the alleged protected activity and, as a result, plaintiff could not show that (1) his protected activity was a substantial factor in motivating the adverse action or (2) the adverse action chilled the exercise of his First

Amendment rights. In addition, the court stated that the "enforcement of the property regulations presumptively advances a legitimate correctional interest."

Defendant's brief presents the following argument to support the trial court's determinations:

> "Here, a review of the sequence of events in the case establishes that Jones's 'protected activity' could not have motivated the adverse action. Jones alleges that the disposal of his property on February 28, 2009, amounted to retaliation because he filed an inmate grievance on February 17, 2009. … However, Jones's property records establish that the removal of the excess property occurred on January 30, 2009, at which time plaintiff was given notice of the confiscation as required by the Code of Regulations. … Jones was expressly notified that if he failed to select a method of disposing his excess property, or if he did not maintain a positive trust account balance, prison officials were required to determine the method of disposing of the property."

In defendants' view, because the process of disposing of the confiscated property began in January 2009, well before plaintiff filed his grievance on February 17, 2009, the alleged adverse action occurred before the protected conduct and, therefore, the causal connection necessary for a retaliation claim cannot be stated.

D. Analysis of Claim

Our analysis will consider the destruction of plaintiff's legal materials as the retaliatory action taken against him and will not be concerned with the destruction of his personal property.[6] Plaintiff's opening brief adopts a similar focus.

1. Factual Dispute Over Destruction of Legal Materials

Plaintiff's allegation that Officers Banuelos and Rodriguez destroyed his legal property stands in contradiction to the position taken by the prison officials at each level

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6 The loss or destruction of legal materials by prison officials has been addressed by the United States Court of Appeals in a number of cases. (E.g., *Monroe v. Beard* (3d Cir. 2008) 536 F.3d 198, 204; *United States v. Gabaldon* (10th Cir. 2008) 522 F.3d 1121, 1124; *Vigliotto v. Terry* (9th Cir. 1989) 873 F.2d 1201, 1202; *Adams v. Carlson* (7th Cir. 1973) 488 F.2d 619, 623.)

of review of the CDC 602 Appeal. Starting with Officer Rodriguez's written response after his informal review and continuing through the director's decision, prison officials took the position that all of plaintiff's legal materials had been returned to him. The director's level appeal decision dated September 14, 2009, found: "The CDC Form 1083 reflects that [plaintiff] was issued all his legal material." Defendants' position that all legal items were returned to plaintiff necessarily implies that when defendants disposed of plaintiff's excess personal property, no legal materials were destroyed.

In the procedural context of a demurrer, when the reviewing court is confronted with different versions of what occurred, it presumes the truth of the facts alleged in the plaintiff's pleadings. (*City of Dinuba v. County of Tulare*, *supra*, 41 Cal.4th 859, 865 ["we treat the demurrer as admitting all material facts properly pleaded"].) Defendants—apparently in an attempt to counter this presumption—argue that plaintiff's "own records indicate that his legal property was returned to him …." The document to which they cite is the receipt on the CDCR 1083 form dated January 30, 2009, which bears plaintiff's signature. Plaintiff referred to this form in his CDC 602 Appeal where he states he signed the form reluctantly while he was being examined by a doctor. Also, the FAC alleges that prison "staff dictate that inmates sign the CDC 1083 Form prior to receiving or inventorying their property …." These allegations support the inference that plaintiff was not able to see the materials actually delivered to his cell before he signed the form and, therefore, he did not freely consent to the statements made in the receipt. (See Civ. Code, §§ 1565 [consent must be free] & 1567 [freedom of consent].) The inference that plaintiff signed the receipt before seeing his property is consistent with his statement that, upon return to his cell, he noticed items were missing, including legal documents, articles, exhibits, notes and legal papers pertaining to his court cases.

In short, the statement in the receipt signed by plaintiff that all legal material had been returned to plaintiff is not necessarily binding on plaintiff and does not preclude him from alleging the receipt is inaccurate and explaining why he should not be bound by its

terms. Therefore, for purposes of reviewing the demurrer brought in this case, we will presume the truth of the allegation that Officers Banuelos and Rodriguez destroyed legal materials belonging to plaintiff on February 28, 2009.

2. Sequence of Protected Conduct and Retaliatory Act

Paragraph 9 of the FAC alleged plaintiff's constitutionally protected conduct was the filing of the CDC 602 Appeal. It also alleged that on February 28, 2009, Officer Rodriguez, in retaliation for filing the CDC 602 Appeal, disposed of legal property belonging to plaintiff. Thus, as alleged by plaintiff, the destruction of his legal materials clearly occurred after the CDC 602 Appeal was initiated by plaintiff on February 17, 2009.

Defendants' argument that the process that resulted in the destruction of plaintiff's legal property began on January 30, 2009, is flawed because it assumes that the process, once started, inevitably led to the destruction of plaintiff's legal materials. We reject this assumption of inevitability. When Officer Rodriguez conducted the informal review of the CDC 602 Appeal, he could have (1) identified the legal materials included in the property Officer Banuelos confiscated from plaintiff and (2) directed that those items be returned to plaintiff. Nothing in the appellate record suggests that Officer Rodriguez was compelled to find there were no legal materials among the confiscated items and then destroy those legal materials two days after he finished the informal review. In other words, what happened before Officer Rodriguez began the informal review did not predetermine the outcome of that review or require the destruction of plaintiff's legal materials on February 28, 2009.

In summary, plaintiff's allegations clearly describe a retaliatory act—the destruction of plaintiff's legal property on February 28, 2009—that occurred after plaintiff's protected conduct—namely, the filing of the CDC 602 Appeal on February 17,

2009. Therefore, plaintiff has alleged facts that satisfy the causal connection element of the retaliation claim.

3. Chilling Effect

Plaintiff did not allege that the allegedly retaliatory action chilled the exercise of his First Amendment rights. Instead, he alleged that the missing legal items "severely prejudiced Plaintiff's right to a fair and impartial discipline/rules violation report hearing, and ultimately, further access to the courts."

In their appellate briefs, defendants do not argue that plaintiff's allegations are insufficient to satisfy the element of a First Amendment retaliation claim that the adverse action taken against the prisoner "chilled the inmate's exercise of his First Amendment right." (*Rhodes v. Robinson*, *supra*, 408 F.3d at p. 567.) At oral argument, defense counsel was asked if defendants were asserting the chilling-effect element was not alleged adequately. Counsel did not answer that question, but instead responded that their position on the retaliation claim was that any adverse action occurred before the protected activity, and therefore there was no retaliation—a position that did not involve the chilling-effect element.

In the absence of any argument or challenge to the sufficiency of plaintiff's allegations concerning the chilling-effect element, we conclude that plaintiff's allegation of the actual destruction of his legal property coupled with his allegation of severe prejudice in connection with administrative and court hearings are sufficient to allege he suffered "harm that is more than minimal" and thus satisfy the chilling-effect element. In *Rhodes v. Robinson*, *supra*, 408 F.3d 559, the court stated: "If [the inmate] had not alleged a chilling effect, perhaps his allegations that he suffered harm would suffice, since harm that is more than minimal would seem to have a chilling effect." (*Id*. at p. 567, fn. 11 [allegation that plaintiff suffered harm might satisfy element regarding chilling effect].) We agree with this analysis because an allegation regarding chilling effect does not require a plaintiff to allege he or she was actually affected by the

retaliatory conduct. (See *Brodheim v. Cry* (9th Cir. 2009) 584 F.3d 1262, 1271 ["objective standard governs the chilling inquiry; a plaintiff does not have to show that his speech was actually inhibited or suppressed"]; *Hines v. Gomez* (9th Cir. 1997) 108 F.3d 265,269-270.) Thus, plaintiff's allegations satisfy the chilling-effect element.

4. Action That Advances a Legitimate Correctional Goal

A First Amendment retaliation claim requires a prisoner to establish that the adverse action taken against the prisoner "did not reasonably advance a legitimate correctional goal." (*Rhodes v. Robinson*, *supra*, 408 F.3d at p. 568.)

Here, the FAC did not explicitly allege that the destruction of plaintiff's legal materials did not reasonably advance a legitimate correctional goal. Plaintiff's opening brief addresses this element of his retaliation claim by arguing that defendants "can not possibly claim a legitimate penalogical interest here, as a legitimate penalogical interest is certainly not served by disposing of a prisoner's legal property."

Because defendants have maintained that the legal materials were returned to plaintiff and have not argued it had a legitimate correctional goal for destroying any legal materials, we conclude that plaintiff's allegations regarding the destruction of his legal materials satisfies this element.

5. Conclusion

Based on the foregoing, we conclude that plaintiff has stated a First Amendment retaliation claim against both Banuelos and Rodriguez.

VI. RIGHT TO ACCESS TO THE COURT CLAIM

A. General Principles

Prisoners have a constitutional right to access to the courts. (*Lewis v. Casey* (1996) 518 U.S. 343, 346.) A plaintiff attempting to state a claim for a violation of his right to court access must allege actual injury. (*Id*. at p. 349.) Before a denial of access to the courts claim can go forward, a prisoner must "demonstrate that a nonfrivolous legal

claim had been frustrated or was being impeded." (*Id*. at p. 353, fns. omitted.) Not every nonfrivolous legal claim receives constitutional protection. The United States Supreme Court has limited the legal claims for which access to the courts is safeguarded to direct appeals from convictions, habeas corpus proceedings and civil rights actions. (*Id*. at p. 354.)

In *Christopher v. Harbury* (2002) 536 U.S. 403, the court addressed the allegations necessary to state a claim for denial of the right to access to courts. The court distinguished between claims involving a litigating opportunity already lost (i.e., backward-looking access claims) and claims involving a litigating opportunity yet to be gained (i.e., forward-looking access claims). (*Id*. at pp. 414-415.) An example of a forward-looking claim is a prisoner class action to remove roadblocks to future litigation, such as an inadequate prison library. (*Id*. at p. 415.) The elements for a backward-looking access cause of action, which is the type plaintiff is asserting here, include (1) actual injury, (2) the official acts frustrating the litigation, and (3) a remedy that may be awarded as recompense that is not otherwise available in a future suit. (*Id*. at pp. 413-414.) To sufficiently plead actual injury—that is, the loss or impediment of an arguable, nonfrivolous underlying cause of action—a plaintiff must describe the underlying cause of action "well enough to apply the 'nonfrivolous' test and to show that the 'arguable' nature of the underlying claim is more than hope." (*Id*. at p. 416.) To adequately plead the third element, "the complaint must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought." (*Id*. at p. 415.)

The foregoing principles regarding actual injury were applied in *McNeal v. Ervin* (9th Cir. 2011) 460 Fed.Appx. 621. The Ninth Circuit concluded that the "district court properly dismissed McNeal's access-to-courts claim because McNeal did not allege facts showing that defendants' loss of his legal materials in 2004 resulted in any actual injury." (*Id*. at p. 622.) The district court considered McNeal's allegation that the confiscation

deprived him of access to the courts in a subsequent habeas corpus petition. (*McNeal v. Ervin* (E.D.Cal., Mar. 3, 2010, No. CIV S-07-2240 LKK EFB P) 2010 WL 3432282.) The district court found McNeal had presented thorough briefing to the district court and Ninth Circuit in connection with his habeas petition and, thus, was not denied effective access to those courts because of the lost materials. (*Ibid*.)

B. Analysis of Plaintiff's Claim

Defendants contend that plaintiff's allegations fail to satisfy the actual injury element and, moreover, plaintiff is unable to demonstrate that their alleged actions caused him actual prejudice to existing litigation.

The FAC itself does not contain factual allegations identifying an underlying cause of action that was lost or impeded by the destruction of his legal material, much less a description of that cause of action showing it is not frivolous and has an "'arguable'" nature that is more than a hope. (*Christopher v. Harbury*, *supra*, 536 U.S. at p. 413.) Instead, the FAC includes a nonspecific allegation that the missing legal items "severely prejudiced Plaintiff's right to a fair and impartial disciplinary/rules violation report hearing, and ultimately, further access to the court."

The exhibits to the FAC include assertions that come closer to explaining how plaintiff's access to the courts was harmed by the destruction of his legal material. The CDC 602 Appeal contains a request that plaintiff's remaining legal property be delivered to him as soon as possible because his court cases were still active with a court deadline of April 10, 2009. The FAC and its exhibits, however, do not state whether plaintiff actually missed a deadline because of the destruction of his legal materials and, if so, what the consequences of that missed deadline were.

Plaintiff's opening brief asserts that the disposal of his legal property impeded his ability to meet a specific filing deadline imposed by Magistrate Judge Jan M. Adler in a

case pending in the United States District Court for the Southern District of California and, as a result, he "suffered actual injury by failing to meet said deadline."[7]

We conclude the general allegation in the FAC regarding prejudice to his access to the court fails to include factual allegations necessary to plead the actual injury element of an access-to-court claim.

The next question is whether plaintiff should have been granted leave to amend to cure the defect. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) Based on the representations set forth in plaintiff's opening brief about failing to meet a deadline in a federal court case, we conclude that there is a reasonable possibility that the defect can be cured if plaintiff is given an opportunity to amend his access-to-court cause of action.

In *Christopher v. Harbury*, *supra*, 536 U.S. 403, the United States Supreme Court did not set forth the details that should be alleged when the underlying cause of action has been presented in a lawsuit and lost or impeded because of a missed deadline. Consequently, we will provide guidance as to the facts to be set forth in an amendment, should plaintiff choose to amend his pleading. Besides the description of the underlying cause of action required by *Christopher v. Harbury*, *supra*, 536 U.S. 403, the amendment should (1) include the name of the case, the case number, and the court in which it was filed; (2) identify the date and nature of the deadline;[8] (3) identify each cause of action affected by the failure to meet the deadline; and (4) describe how each such cause of action was affected by (a) plaintiff's failure to meet the deadline or (b) plaintiff's inability

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[7] The case to which plaintiff refers might be *Jones v. Ryan* (S.D.Cal., No. 07-CV-1019-JMA). This lawsuit has generated four orders that are available on WestLaw, one of which discussed an opposition by plaintiff dated April 9, 2009. (See *Jones v. Ryan* (S.D.Cal. June 26, 2009, No. 07-CV-1019-JMA) 2009 WL 1883700, 2009 U.S. Dist. LEXIS 56341.)

[8] For example, an allegation that plaintiff had until April 10, 2009, to file an opposition to a motion for summary judgment would identify with sufficient particularity the date and the nature of the deadline.

to include information in the document filed to meet the deadline.[9] If the plaintiff does not have access to this detailed information, his amendment should allege as many of the details as is possible and provide an explanation for why the other details have not been included.

VII. MISCELLANEOUS MATTERS

Ordinarily, our inquiry into an order sustaining a general demurrer "ends and reversal is required once we determine a complaint has stated a cause of action under any legal theory." (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 603.) Under this rule, our analysis could have been limited to the retaliation claim. We, however, chose to address plaintiff's due process, equal protection and access-to-court causes of action because those claims presented legal questions that, if resolved in this appeal, could promote the efficiency of subsequent proceedings. As a result, our directions to the trial court are more detailed than a simple direction to enter an order overruling the general demurrer. (See *id*. at p. 608.)

In addition, from our reading of the FAC, it is not clear whether plaintiff intends to pursue any California tort law claim concerning damage to personal property (i.e., nonconstitutional claims). Under California statute, a demurrer may be sustained on the ground that the "pleading is uncertain." (Code Civ. Proc., § 430.10, subd. (f).) Based on this statute, we direct the trial court to sustain the demurrer as to potential California tort law claims for damage to personal property. (1 Weil & Brown, Cal. Practice Guide: Civil

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9 Generally, this description of how each cause of action was affected should name the order entered by the court, state the date of the order, and describe the rulings that frustrated or impeded the cause of action. At oral argument, plaintiff stated that he missed a deadline and, as a result, two defendants were dismissed from his civil suit. Thus, in describing how each cause of action was affected by the failure to meet the deadline, plaintiff should identify each defendant who obtained a dismissal because of the missed deadline as well as each cause of action asserted against that defendant.

Procedure Before Trial (The Rutter Group 2012) ¶ 6:104, p. 6-28.) The court shall allow plaintiff an opportunity to resolve this uncertainty by amending his pleading and clarifying whether he intends to pursue any state tort law claims (see Cal. Rules of Court, rule 2.112(2) [each separately stated cause of action or count must specifically state its nature (e.g., "for fraud")]).

DISPOSITION

The judgment is reversed. The trial court is directed to vacate its June 30, 2011, order sustaining the demurrer without leave to amend and to enter a new order (1) sustaining the demurrer without leave to amend as to plaintiff's equal protection and due process claims, (2) sustaining the demurrer with leave to amend as to plaintiff's access-to-court claim, (3) sustaining the demurrer on grounds of uncertainty and with leave to amend as to any California tort law claims for damage to personal property, and (4) overruling the demurrer as to plaintiff's retaliation claim against defendants Banuelos and Rodriguez.

Plaintiff shall recover his costs on appeal.

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Franson, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Poochigian, J.